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Supreme Court, U.S.
FILED
SEP 12 1994
OFFICE OF THE CLERK

No. 94-120

In The

Supreme Court of the United States

October Term, 1994

EDWIN L. BRICKER and CYNTHIA BRICKER,

Petitioners,

v.

ROCKWELL HANFORD OPERATIONS, a Division of ROCKWELL INTERNATIONAL CORPORATION; WESTINGHOUSE ELECTRIC CORPORATION; and WESTINGHOUSE HANFORD COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

STUART R. DUNWOODY*
WILLIAM R. SQUIRES III
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150
*Counsel of Record

Attorneys for Respondent Westinghouse Hanford Company

DAVID F. JURCA*
MARK F. RISING
HELSELL, FETTERMAN, MARTIN, TODD & HOKANSON
P.O. Box 21846
Seattle, WA 98111
(206) 292-1144
*Counsel of Record

Attorneys for Respondent Rockwell International Corporation

Of Counsel:
ROBERT A. DUTTON
Assistant General Counsel
Westinghouse Hanford Co.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

16 pp

QUESTION PRESENTED FOR REVIEW

Whether "special factors" exist and bar a former employee of government contractors at a Department of Energy facility from maintaining a *Bivens* action against his former employers where

(i) Congress' enactment of some remedies and its repeated consideration and rejection of proposed legislation to create additional remedies shows that its failure to create the exact remedy that the former employee seeks has not been inadvertent, and

(ii) the former employee had available to him and made use of alternative remedies for redressing the wrong he alleges.

PARTIES TO THE PROCEEDING

The parties in the court of appeals were Edwin L. Bricker and Cynthia Bricker, plaintiffs/appellants, and Rockwell Hanford Operations, an unincorporated division of Rockwell International Corporation, and Westinghouse Hanford Company, defendants/appellees. Although Westinghouse Electric Corporation appears in the caption of the case, it was dismissed from the action by stipulation of the parties in the district court.

RULE 29.1 LISTING

Rockwell International Corporation has no parent companies or subsidiaries (except wholly-owned subsidiaries). Westinghouse Electric Corporation is the parent company of Westinghouse Hanford Company. Westinghouse Hanford Company has no other parent companies and no subsidiaries.

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BRIEF IN OPPOSITION

CITATIONS OF OPINIONS BELOW

The opinion of the court of appeals is reported at 22 F.3d 871. The opinion of the district court is reported at 1991 WL 268026.

STATEMENT OF THE CASE

This case arises out of the employment of petitioner Edwin Bricker at the Hanford Nuclear Reservation in

Southeastern Washington, an installation owned by the United States and managed by the United States Department of Energy. Respondent Rockwell International Corporation operated portions of the Hanford Reservation under contract with DOE from July 1977 through June 28, 1987, and employed Mr. Bricker there for much of that time. Rockwell left the Hanford Reservation as of June 29, 1987, when respondent Westinghouse Hanford Company became DOE's consolidated management contractor at the site. At the same time Westinghouse became Mr. Bricker's employer. Westinghouse continued to employ Mr. Bricker until November 1, 1991, when he voluntarily resigned his position.

Petitioners contend that, starting in the early 1980s, Mr. Bricker became concerned about safety violations and unsafe work practices at the Hanford Reservation and raised these concerns to his supervisors, to managers at Rockwell and then Westinghouse, to members of Congress, and to the news media. Petitioners claim that first Rockwell and then Westinghouse retaliated against Mr. Bricker as a result of his voicing these concerns.[1]

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[1] Neither of the courts below reached the substance of petitioners' allegations of harassment and retaliation, which respondents vigorously deny. The factual allegations contained in the Petition thus remain unproved, and in fact a number of those allegations are contradicted by Mr. Bricker's sworn deposition testimony. Respondents will not engage in a point by point rebuttal of the factual misstatements contained in the Petition, however, because they have no bearing on the question of what issues would properly be before the Court if certiorari were granted. *See* S. Ct. R. 15.1.

In October 1988, Mr. Bricker submitted an administrative complaint to the Department of Energy pursuant to a DOE Order governing occupational health and safety, in which he claimed that Rockwell and Westinghouse had harassed him in retaliation for his having engaged in safety-related activities. At the request of the Department of Energy, an investigator from the Department of Labor investigated Bricker's allegations.

While the investigator found that most of Mr. Bricker's allegations were unfounded, he did find that some discrimination had occurred and recommended as a remedy that negative references to Mr. Bricker in his personnel files be expunged, that a disciplinary notice that Rockwell had issued to Mr. Bricker be rescinded, that Mr. Bricker be paid $126.54 for the one day of wages that he lost and $2,885 for his out-of-pocket expenses, and that an appropriate notice be posted at Mr. Bricker's place of employment at the Hanford Reservation. Mr. Bricker (and respondents) appealed from the investigator's findings and conclusions, but all parties subsequently dropped the appeal. All aspects of the remedy recommended by the investigator have since been implemented.

Shortly after the Department of Labor investigator issued his report, petitioners filed this action against Rockwell and Westinghouse in the United States District Court for the Western District of Washington, seeking damages of thirty million dollars and contending that the alleged harassment of Mr. Bricker both violated petitioners' rights under the First, Fourth, and Fifth Amendments to the United States Constitution and constituted common-law torts under the law of Washington.

Petitioners based their constitutional claims on the authority of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which permits, under certain circumstances, damages suits against federal officials who violate federal constitutional rights under color of federal law. Petitioners asserted that Rockwell and Westinghouse were "federal actors" and were therefore subject to suit under *Bivens*. Rockwell and Westinghouse deny that they are federal actors, and neither the district court nor the court of appeals has decided the issue. *See* Appendix to Petition ("Pet. App.") at App. 7 n.2, App. 25.

The case was transferred, with the consent of the parties, to the United States District Court for the Eastern District of Washington which, without reaching the substance of petitioners' allegations, dismissed the constitutional claims on the ground that the "special factors counselling hesitation" recognized by this Court in *Bivens* were present and precluded petitioners from maintaining a *Bivens* action. The district court dismissed petitioners' state law claims without prejudice. The court of appeals affirmed the district court's ruling in all respects, and unanimously rejected petitioners' request for rehearing en banc.

After the district court dismissed their federal action, petitioners filed suit in the Superior Court of Thurston County, Washington, realleging the state law claims they had asserted in the federal action. The Thurston County Superior Court has since dismissed all of petitioners' claims against Rockwell and a portion of their claims

against Westinghouse as barred by the statute of limitations. That ruling is currently on appeal to the Washington Court of Appeals; petitioners' remaining state law claims against Westinghouse are still pending in Thurston County Superior Court.

REASONS FOR DENYING THE WRIT

The Petition should be denied, both because the issue it presents will not recur in future cases and thus is of historical interest only, and because the decisions below were correctly decided and are fully consistent with the decisions of this Court and of the courts of appeals.

I. The Issue Petitioners Present Is Not Sufficiently Important to Justify Review by This Court.

A recent statutory amendment ensures that the question that petitioners present will not arise in cases that are filed after October 24, 1992. The issue thus is a narrow one that does not justify review by this Court on certiorari.

The question that petitioners present is whether the "special factors" recognized by this Court in *Bivens* and its progeny preclude a plaintiff such as Mr. Bricker, who claims that he has suffered retaliation for voicing health or safety concerns about a DOE installation, from maintaining a damages action directly under the United States Constitution. A recent amendment to Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851, providing remedies for employees of DOE contractors who have

claims for such retaliation arising on or after October 24, 1992,[2] constitutes, under this Court's decisions in *Bush v. Lucas*, 462 U.S. 367 (1983), and *Schweiker v. Chilicky*, 487 U.S. 412 (1988), a "special factor" that would bar any *Bivens* actions by DOE contractor employees for claims arising after that date.

The question that petitioners present, therefore, is whether special factors existed *before* Congress amended Section 210 of the Energy Reorganization Act in October of 1992. This question will only have bearing on those claims by employees of DOE contractors that arose before October 24, 1992 and are not yet barred by the statute of limitations.[3] The issue thus is of historical interest only and will not recur in future cases. It is not an issue worthy of this Court's review on certiorari.

II. The Decision of the Court of Appeals Is Correct and Is Consistent With Other Authority.

In any event, the decisions below are correct and do not conflict with any other authority.

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[2] The amendment was made by the Energy Policy Act of 1992, Pub. L. No. 102-486, § 2902(a), 106 Stat. 2776, 3123 (1992), and applies to claims that are filed on or after the date of its enactment, October 24, 1992. *Id.*, § 2902(i), 106 Stat. at 3125.

[3] Counsel for respondents are aware of only one other case currently pending in which an employee of a DOE contractor asserts a *Bivens* claim that arose before October 24, 1992 against his employer, *Lekvold v. Westinghouse Hanford Co.*, 26 F.3d 131 (9th Cir. 1994) (table), *petition for cert. filed*, No. 94-310 (U.S. Aug. 17, 1994).

Under this Court's decisions in *Bush* and *Chilicky*, special factors bar a *Bivens* suit when alternative remedies exist for the harm that the plaintiff alleges. Special factors will also bar suit even where no alternative remedy exists, so long as Congress' failure to provide the precise remedy that the plaintiff seeks has not been inadvertent. *Chilicky*, 487 U.S. at 423. The courts below correctly held that Congress' failure to provide petitioners with the precise remedy they seek had not been inadvertent, and that petitioners had alternative remedies.

A. Congress' Failure to Provide the Precise Remedy That Petitioners Seek Was Not Inadvertent.

Congress' failure to create a remedy for persons in Mr. Bricker's position – employees of DOE contractors who voice health and safety concerns at DOE installations – was anything but inadvertent.

This is clear first from Congress' enactment in 1978 of Section 210 of the Energy Reorganization Act. As originally enacted, Section 210 protected only employees of commercial nuclear facilities from retaliation. 42 U.S.C. § 5851 (1988). As the district court recognized, relying on the decision of the Fourth Circuit in *Adams v. Dole*, 927 F.2d 771, 776 (4th Cir.), *cert. denied*, 112 S. Ct. 122 (1991), Congress deliberately excluded employees of DOE contractors from the protections of Section 210 when it first enacted the statute. Pet. App. at App. 31 - App. 32. Its failure to provide those protections to persons such as Mr. Bricker thus was not inadvertent.

Congress' lack of inadvertence in providing the remedy petitioners seek for employees of DOE contractors

was repeatedly demonstrated between 1978, when Section 210 was first enacted, and 1992, when it was finally amended to include employees of DOE contractors. During that time Congress repeatedly considered and, until 1992, rejected bills that would create protections for whistleblowers at DOE installations.[4] Although none of the bills was enacted, they received substantial attention from Congress. Many of the bills had numerous co-sponsors. One bill, S. 436, 101st Cong., 1st Sess. (1989), was favorably reported to the full Senate in a report noting the current lack of whistleblower protection for contractor employees at DOE facilities. *See* S. Rep. No. 349, 101st Cong., 2d Sess. 17-18 (1990). Furthermore, Congress considered these bills at the same time that it was enacting whistleblower protections for other classes of employees.[5] These failed bills thus show that Congress' failure to enact protections for DOE employees before October 1992 was not inadvertent.[6]

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[4] Some (but not all) of these bills are cited in the opinion of the court of appeals. *See* Pet. App. at App. 11 n.4.

[5] For example, a bill to create whistleblower protections for employees of Department of Defense contractors, H.R. 2579, 101st Cong., 1st Sess., and a bill to create protections for employees of DOE contractors, H.R. 3255, 101st Cong., 1st Sess., were both considered at a joint hearing of a subcommittee of the House Armed Services Committee. *See* Lexis Bill Tracking Reports 1989 H.R. 2579 and 1989 H.R. 3255. Congress enacted the first bill as part of the Defense Authorization Act for Fiscal Year 1991, 10 U.S.C. § 2409a, but failed to enact the bill that would have created similar protections for DOE contractor employees.

[6] The courts below did not consider the failed legislation to construe a previously enacted statute, *see* Pet. at 12-13 (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650

Finally, as the court of appeals recognized, Congress' lack of inadvertence is shown by the very enactment of the amendments to Section 210 and by the decision to give those amendments only prospective effect. Pet. App. at App. 11 - App. 12.

B. The Alternative Remedies Available to Petitioners Also Bar Their *Bivens* Claim.

The courts below also correctly held, as an independent ground for their decisions, that alternative remedies were available to petitioners and constitute a special factor barring them from a judicially-created *Bivens* action. Pet. App. at App. 14 - App. 19 and App. 35 - App. 36. Specifically, Mr. Bricker availed himself of the remedies offered by DOE Order 5483.1A, and the court of appeals properly found that this remedy was congressionally authorized. Pet. App. at App. 15 - App. 16. In addition, as the courts below recognized, Mr. Bricker had remedies under the grievance and arbitration provisions of his collective bargaining agreement and under the National Labor Relations Act.[7] Petitioners' arguments that the

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(1990)). Rather, they properly considered the failed bills to determine that Congress was aware of the issue and that its failure to enact the remedy that petitioners seek was not inadvertent. *See Bob Jones University v. United States*, 461 U.S. 574, 600-601 (1983).

[7] The courts of appeals recognize that remedies under a collective bargaining agreement and the NLRA constitute special factors that will bar a *Bivens* claim. *See, e.g., Pereira v. United States Postal Service*, 964 F.2d 873 (9th Cir. 1992) (collective bargaining remedy); *McCollum v. Bolger*, 794 F.2d 602 (11th Cir. 1986) (same), *cert. denied*, 479 U.S. 1034 (1987); *Ellis v. United*

decisions below conflict with *McCarthy v. Madigan*, 112 S. Ct. 1081 (1992), and *Krueger v. Lyng*, 927 F.2d 1050 (8th Cir. 1991), were considered and properly rejected by the court of appeals. *See* Pet. App. at App. 16 - App. 19.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

STUART R. DUNWOODY*
WILLIAM R. SQUIRES III
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150
*Counsel of Record

Attorneys for Respondent Westinghouse Hanford Company

DAVID F. JURCA*
MARK F. RISING
HELSELL, FETTERMAN, MARTIN, TODD & HOKANSON
P.O. Box 21846
Seattle, WA 98111
(206) 292-1144
*Counsel of Record

Attorneys for Respondent Rockwell International Corporation

Of Counsel:
ROBERT A. DUTTON
Assistant General Counsel
Westinghouse Hanford Co.

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States Postal Service, 784 F.2d 835 (7th Cir. 1986) (same); *Gaj v. United States Postal Service*, 800 F.2d 64, 68 (3d Cir. 1986) (NLRA remedy).